(2)

No. 90-756

IN THE

Supreme Court of the United States

October Term, 1990

GARY McKNIGHT,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Are claims of discriminatory discharge actionable under 42 U.S.C. § 1981 in light of this Court's decision in *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989)?

RULE 29.1 LIST

General Motors Corporation has no parent corporation. It owns an interest in the following companies which are not wholly owned subsidiaries:

Aralmex, S.A. de C.V. (Mexico);
Automotriz Gencor S.A. (Ecuador);
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador);
Companis Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico);
Compresores Delfa, C.A. (Venezuela);
Convesco Vehicle Sales GmbH (Germany);
Daewoo Motor Co., Ltd. (Korea);
DHB-Componentes Automotives S.A. (Brazil);
Fabrica Columbians de Automotores S.A. ("Colomotores") (Columbia);
General Motors de Columbia S.A. (Columbia);
General Motors Egypt, S.A.E. (Egypt);
General Motors Iran Limited (Iran);
General Motors Kenya Limited (Kenya);
GM Allison Japan Limited (Japan);
GM Fanuc Robotics Corp. (USA);
Industries Mecaniques Meghrebires, S.A. (Tunisia);
Industrija Delova Automobils, Kikinda (Yugoslavia);
Isuzu Motors Limited (Japan);
Isuzu Motors Overseas Distribution Corp. (Japan);
Kabelwerke Reinshagen GmbH (Germany);
Kabelwerke Reinshagen Werk Berlin GmbH (Germany);
Kabelwerke Reinshagen Werk Neumarkt GmbH (Germany);
Moto Diesel Mexicana, S.A. de C.V. (Mexico);
Motor Enterprises, Inc. (USA);
New United Motor Manufacturing, Inc. (USA);
Omnibus BB Transportes, S.A. (Ecuador);
Promotora de Partes Electronicos Automotrices (Mexico);
P.T. Mesin Isuzu Indonesia (Indonesia);
Senalizacion y Accessorios del Automobil Yorka, S.A. (Spain);
Suzuki Motor Co., Ltd. (Japan);
Unicables, S.A. (Spain).

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, General Motors Corporation ("GM"), by its undersigned counsel, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Seventh Circuit's decision in *McKnight v. General Motors Corporation*, 908 F.2d 104 (7th Cir. 1990).

COUNTERSTATEMENT OF THE CASE

GM hired Petitioner, Gary McKnight ("McKnight"), in August of 1978. McKnight initially worked as a manufacturing supervisor and later was transferred to the accounting department as part of a rotation system designed to provide a broad range of experience to managerial employees. (R. 117, at 120; R. 122, at 15.)

While working as a manufacturing supervisor, McKnight received a performance appraisal which gave him an overall rating of "Highly Effective," the second highest rating. After transferring to accounting, however, McKnight received less favorable evaluations of "Needs Slight Improvement" and "Good Competent." (R. 121, at 31-35; R. 122, at 98-99; Def. Ex. 304, 305.)

In late 1981, McKnight was one of many employees laid off due to the severe slack in the automobile business. He was recalled to work shortly thereafter and reassigned as a manufacturing supervisor. Over the course of the next 22 months, McKnight reported to four different general supervisors—two of whom are black—all of whom noted serious deficiencies in McKnight's performance. (Def. Ex. 321, 327, 328, 330, 331, 333, 347A, 347B, 347C.) All four supervisors counseled McKnight on an ongoing basis in an effort to help him improve his performance, but to no avail. Additionally, the Manufacturing Superintendent in charge of McKnight's general supervisors and the Personnel Director—both of whom are black—worked directly with McKnight to address his performance problems. (R. 54, at 50, 63-67, 73-74, 92; R. 117, at 144-45.) When McKnight failed to improve his performance after almost two years, his employment was terminated.

McKnight filed various administrative and state court charges concerning his employment with GM. He subsequently filed this action, in which he alleged discriminatory and retaliatory discharge in violation of 42 U.S.C. § 1981 and Title VII, 42 U.S.C. § 2000e. The jury returned a verdict for McKnight on his § 1981 claims and, based on the jury's verdict, the trial court entered judgment for McKnight on his Title VII claims as well.

While the case was pending before the Seventh Circuit Court of Appeals, this Court decided *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989). In *Patterson*, this Court held that § 1981 applies only to racially discriminatory conduct which impairs either (1) the right to make a contract or (2) the right to enforce a contract through legal processes. Since neither prong of § 1981

is implicated in McKnight's claims of discriminatory and retaliatory discharge, the Seventh Circuit concluded that those claims are not actionable under § 1981 and reversed the portion of the judgment awarding McKnight relief under § 1981. 908 F.2d at 108-09.

REASONS FOR DENYING THE WRIT

The Seventh Circuit's application of *Patterson* to discharge claims aligns that Circuit with the Second, Fifth, Sixth and Ninth Circuits and is consistent with numerous district court decisions in the other Circuits. Only one panel of the Eighth Circuit Court of Appeals and a few district court judges have reached a contrary conclusion. The Seventh Circuit's decision is clearly correct, and McKnight's request for further examination of the applicability of § 1981 to his discharge claims is unwarranted.

The remaining issues suggested in the petition were not determined below and therefore do not warrant consideration by this Court in this case.

I. THE SEVENTH CIRCUIT'S DECISION IN THIS CASE DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS ON THE QUESTION WHETHER DISCRIMINATORY DISCHARGE CLAIMS ARE ACTIONABLE UNDER 42 U.S.C. § 1981, AND THE COURT NEED NOT GRANT CERTIORARI TO CORRECT THE CONFLICT WITHIN THE EIGHTH CIRCUIT ON THIS ISSUE.

Title 42 U.S.C. § 1981 provides, in part, as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . .

In *Patterson*, this Court clarified the scope of § 1981 as it relates to employment discrimination claims, noting:

> The most obvious feature of the provision is the restriction of its scope to forbidding discrimination in the "mak[ing] and enforce[ment]" of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, § 1981 provides no relief. Section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts.

109 S. Ct. at 2370 (citations omitted).

In explaining the first prong of § 1981, *i.e.* the right to make contracts, this Court stated:

> The first of these protections extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment. The statute prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms. But the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, *including breach of the terms of the contract* or imposition of discriminatory working conditions. Such postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII.

Id. at 2372-73 (emphasis added).

As to the second prong of § 1981, the right to enforce contracts, the Court explained:

> The second of these guarantees, "the same right . . . to . . . enforce contracts . . . as is enjoyed by white citizens," embraces protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law

> claims without regard to race. In this respect, it prohibits discrimination that infects the legal process in ways that prevent one from enforcing contract rights, by reason of his or her race, and this is so whether this discrimination is attributed to a statute or simply to existing practices. It also covers wholly *private* efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations, as well as discrimination by private entities, such as labor unions, in enforcing the terms of a contract . . . The right to enforce contracts does not, however, extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights.

Id. at 2373 (emphasis in original).

The specific issue before the Court in *Patterson* was whether claims of racial harassment are actionable under 42 U.S.C. § 1981. The Court observed that such claims do not involve either a refusal to enter into a contract or an impairment of the ability to enforce established contract rights, but rather involve postformation conduct relating to the terms and conditions of employment. The Court held that such postformation conduct is not within the scope of § 1981. 109 S. Ct. at 2373-77.

Although *Patterson* itself involved a claim of racial harassment, the Court's construction of § 1981 applies with equal force to other claims relating to postformation conduct. Claims of discriminatory discharge necessarily involve postformation conduct and, under a plain reading of *Patterson*, it follows that such claims are not actionable under § 1981. The Seventh Circuit reached precisely this conclusion in this case. 908 F.2d at 108-09.

The Seventh Circuit's application of *Patterson* to discriminatory discharge claims is by no means novel. Indeed, as McKnight concedes, almost every court to consider the issue has concluded that § 1981, as clarified by *Patterson*, plainly does not apply to discharge claims. (Petition, at 11-12.) As of the time the Seventh Circuit issued its decision in this case, both the Fifth and Ninth Circuits already had determined that discriminatory discharge

claims are not actionable under § 1981. *Lavender v. V & B Transmission & Auto Repair*, 897 F.2d 805, 807-08 (5th Cir. 1990); *Carroll v. General Accident Ins. Co.*, 891 F.2d 1174, 1177 (5th Cir. 1990); *Courtney v. Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845, 849 (9th Cir. 1990). The Second and Sixth Circuits have since joined the ranks of the majority, also holding that *Patterson* clearly bars discriminatory discharge claims under § 1981. *Gonzalez v. Home Insurance Co.*, 909 F.2d 716, 722 (2d Cir. 1990); *Prather v. Dayton Power & Light Co.*, ___ F.2d ___, 1990 U.S. App. LEXIS 20025, at *3-*9 (6th Cir. Nov. 14, 1990). *See also Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1535 (11th Cir. 1990) (per curiam) (retaliatory discharge claim not actionable under § 1981.)

The vast majority of district courts have reached the same conclusion. *See, e.g., Tuck v. Pro Football, Inc.*, 1990 U.S. Dist. LEXIS 8790, at *2 (D.D.C. July 10, 1990); *Jong Ping Hsu v. Raytheon Co.*, 1990 U.S. Dist. LEXIS 8318, at *2 (D. Mass. July 2, 1990); *Newton v. A.B. Dick Co.*, 738 F. Supp. 952, 954 (D. Md. 1990); *Weldon v. Kraft, Inc.*, 739 F.Supp. 972, 974 (E.D. Pa. 1990); *Anderson v. United Auto Workers*, 1990 U.S. Dist. LEXIS 5262, at *18 (D. Kan. Apr. 17, 1990); *Long v. AT&T Information Systems, Inc.*, 733 F. Supp. 188, 195 (S.D.N.Y. 1990); *White v. Federal Express Corp.*, 729 F. Supp. 1536, 1545 (E.D. Va. 1990); *Coleman v. Domino's Pizza, Inc.*, 728 F. Supp. 1528, 1531 (S.D. Ala. 1990); *Rivera v. AT&T Information Systems*, 719 F. Supp. 962, 965 (D. Colo. 1989); *Hall v. County of Cook, Illinois*, 719 F. Supp. 721, 724 (N.D. Ill. 1989); *Greggs v. Hillman Distributing Co.*, 719 F. Supp. 552, 554 (S.D. Tex. 1989).

Virtually the only contrary authority is the Eighth Circuit's decision in *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990), *pet. for cert. pending*, No. 90-324 (filed Aug. 17, 1990).[1]

[1]As McKnight notes, two district court judges in Colorado and Kansas also have held that *Patterson* does not apply to discriminatory discharge claims. (Petition, at 12-13.) Those decisions have been widely

(footnote continued on next page).

In *Hicks*, a divided panel reasoned that protection from racially motivated deprivations of contracts is essential to the full enjoyment of the right to make contracts. "[D]iscriminatory discharge goes to the very existence and nature of the employment contract. A discriminatory discharge completely deprives the employee of his or her employment, the very essence of the right to make employment contracts." 902 F.2d at 639.

The Eighth Circuit's reasoning in *Hicks* simply cannot be reconciled with this Court's construction of § 1981 in *Patterson*. The decision to terminate a long-term employee does not logically implicate the employee's right to enter into a nondiscriminatory employment contract. Rather, circumstances culminating in termination necessarily constitute postformation conduct and, under the plain language of *Patterson*, may not be redressed under § 1981.

Hicks is flawed not only because it ignores the broad holding of *Patterson*, but also because the court failed to consider the availability of Title VII remedies for discriminatory discharge. As this Court noted in *Patterson*, Title VII encompasses "detailed and well-crafted [administrative] procedures" designed to assist with the investigation of discrimination claims and resolve these claims through conciliation rather than litigation. 109 S. Ct. at 2374-75. These administrative procedures must be exhausted be-

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(footnote continued from previous page).
criticized, however, and have been rejected even by other judges in those same districts. *Compare Booth v. Terminix International, Inc.*, 722 F. Supp. 675, 676 (D. Kan. 1989) *and Birdwhistle v. Kansas Power & Light* Co., 723 F. Supp. 570, 575 (D. Kan. 1989) (Saffels, J.) (*Patterson* does not bar discriminatory dicharge claims under § 1981) *with Anderson v. United Auto Workers*, 1990 U.S. Dist. LEXIS 5262, at *18 (D. Kan. Apr. 17, 1990) (O'Connor, C.J.) (discriminatory discharge claims under § 1981 do not survive *Patterson*); *and compare Padilla v. United Air Lines*, 716 F. Supp. 485, 489-90 (D. Colo. 1989) (Arraj, J.) (*Patterson* does not affect viability of § 1981 discharge claims) *with Rivera v. AT&T Information Systems*, 719 F. Supp. 962, 965 (D. Colo. 1989) (Babcock, J.) (rejecting *Padilla* and holding that discriminatory discharge is postformation conduct which is not actionable under *Patterson*'s construction of § 1981).

fore a claimant may bring a Title VII action in court. Section 1981, on the other hand, provides no administrative review or opportunity for conciliation. This important distinction prompted this Court in *Patterson* to caution against straining § 1981 to cover conduct already actionable under Title VII:

> Where conduct is covered by both § 1981 and Title VII, the detailed procedures of Title VII are rendered a dead letter, as the plaintiff is free to pursue a claim by bringing suit under § 1981 without resort to those statutory prerequisites. We agree that, after *Runyon*, there is some necessary overlap between Title VII and § 1981, and that where the statutes do in fact overlap we are not at liberty "to infer any positive preference for one over the other." [Citation omitted.] We should be reluctant, however, to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute. [Citation omitted.] That egregious racial harassment of employees is forbidden by a clearly applicable law (Title VII), moreover, should lessen the temptation for this Court to twist the interpretation of another statute (§ 1981) to cover the same conduct. . . .
>
> By reading § 1981 not as a general proscription of racial discrimination in all aspects of contract relations, but as limited to the enumerated rights within its express protection, specifically the right to make and enforce contracts, we may preserve the integrity of Title VII's procedures without sacrificing any significant coverage of the civil rights laws. [Footnote omitted.] Of course, *some overlap will remain* between the two statutes: *specifically, a refusal to enter into an employment contract on the basis of race.* . . . But this is precisely where it would make sense for Congress to provide for the overlap. At this stage of the employee-employer relation Title VII's mediation and conciliation procedures would be of minimal effect, for there is not yet a relation to salvage.

109 S. Ct. at 2375 (emphasis added).

Notwithstanding the fact that the only area of overlap between Title VII and § 1981 which this Court countenanced in *Patterson* is refusals to hire, the *Hicks* court concluded that discriminatory

discharge claims also may be pursued under either statute. The *Hicks* court suggested that the deference this Court has accorded to the detailed remedial scheme of Title VII should not extend to discharge claims because, like claimants who have been denied employment, discharged employees have no relationship with the employer to salvage. 902 F.2d at 640.

Hicks thus ignores the fact that Title VII procedures are specifically designed to reinstate discharged employees and resurrect employment relationships. Indeed, almost half of all Title VII cases involve discharge, a greater percentage than any other Title VII issue. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CENTRAL DATABASE STATISTICS (1989), *cited in Prather v. Dayton Power & Light Co.*, 1990 U.S. App. LEXIS 20025, at *5 n.3 (6th Cir. Nov. 14, 1990). As this Court noted in *Patterson*, permitting discharged employees to pursue additional remedies under § 1981—including punitive damages—would discourage employees from pursuing conciliatory efforts required under Title VII. *Patterson*, 109 S. Ct. at 2375 n.4.

In contrast to *Hicks*, decisions construing *Patterson* to bar discharge claims under § 1981 adhere to this Court's strongly expressed preference to avoid overlap between § 1981 and Title VII and thereby dissuade claimants from circumventing the procedures encompassed in Title VII. *See, e.g., Carter v. South Central Bell*, 912 F.2d 832, 839 (5th Cir. 1990); *Prather v. Dayton Power & Light Co.*, 1990 U.S. App. LEXIS 20025, at *5 (6th Cir. Nov. 14, 1990).

While *Hicks* does conflict with the decisions of the Second, Fifth, Sixth, Seventh and Ninth Circuits, it is not necessary for this Court to issue another decision reiterating the scope of § 1981 in order to resolve the conflict. *Hicks* plainly is an aberration; it has been widely criticized and flatly rejected by every other Court of Appeals to address it. *See* cases cited at page 6 *supra*. Thus, there is little danger that *Hicks* will generate conflicting decisions in the future.

Moreover, it is questionable whether *Hicks* will even continue to be followed by the Eighth Circuit. Another panel of the Eighth Circuit recently issued a published opinion stating that, in its view, *Hicks* was decided erroneously. *Taggart v. Jefferson County Child Support Enforcement Unit,* 915 F.2d 396 (8th Cir. 1990). This intracircuit conflict should be addressed by the Eighth Circuit Court of Appeals *in banc*.[2] In that event, the existing conflict among the Courts of Appeals created by *Hicks* may well be corrected without intervention by this Court. Accordingly, this Court need not revisit its comprehensive analysis of § 1981 set forth in *Patterson,* and the petition for certiorari should be denied.

II. THE SEVENTH CIRCUIT DID NOT DECIDE WHETHER RETALIATORY DISCHARGE CLAIMS ARE ACTIONABLE UNDER § 1981, AND THERE IS NO CONFLICT AMONG THE CIRCUITS ON THIS ISSUE.

Although McKnight does not include the viability of retaliatory discharge claims as a question presented for review, he argues in his Petition that review is warranted on this question. (Petition, at 13.) To the contrary, this question does not warrant review by this Court, for two reasons.

First, the Seventh Circuit's decision in this case does not purport to resolve the question posed by McKnight: "whether Section 1981 contemplates . . . actions for retaliatory discharge." (Petition, at 13.) Instead, the Seventh Circuit posited that GM "might" be guilty of violating § 1981 if it retaliated against McKnight for enforcing contract rights. 908 F.2d at 111-12. The Seventh Circuit did not reach this issue because it determined that, in any event, McKnight's claims did not involve retaliation

[2]Although four judges voted in favor of rehearing *Hicks* in banc, the petition was denied on June 4, 1990 in an unreported decision available at 1990 U.S. App. LEXIS 9543. A petition for certiorari in *Hicks* currently is pending before this Court. *Brown Group Inc. v. Hicks,* No. 90-324 (filed Aug. 17, 1990).

for seeking to enforce "contractual entitlements." *Id.* at 112. McKnight does not challenge in his Petition either the requirement that actionable retaliation relate to enforcement of contract rights or the Seventh Circuit's observation that none of McKnight's state court or administrative complaints sought to enforce contractual rights. It is therefore apparent that the Seventh Circuit's disposition of McKnight's retaliation claim does not warrant further review.

Second, even if the Seventh Circuit's decision could be read as a determination that *Patterson* bars retaliatory discharge claims under § 1981, such a determination does not warrant review by this Court because there is no conflict among the circuits on this issue. Although McKnight represents that "[t]he lower courts appear to be divided on this question as well" (Petition, at 13), the authorities cited by McKnight to support this statement do not evidence any conflict at all. In *Rathjen v. Litchfield*, 878 F.2d 836 (5th Cir. 1989), the Fifth Circuit questioned whether retaliation claims would be actionable under *Patterson's* construction of § 1981, but did not decide the issue. *Id.* at 842. Similarly, the Seventh Circuit declined to reach this issue in *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989), having determined that the claim failed on the merits in any event. *Id.* at 1313.

The post-*Patterson* Court of Appeals cases which do squarely address the actionability of retaliatory discharge claims under § 1981 uniformly hold that such claims are not actionable. *Chambers v. Southwestern Bell Telephone Co.*, 917 F.2d 5, 7 (5th Cir. 1990); *Carter v. South Central Bell*, 912 F.2d 832, 833 (5th Cir. 1990); *Christian v. Beacon Journal Publishing Co.*, 1990 U.S. App. LEXIS 12080, at *8 (6th Cir. July 17, 1990); *Overby v. Chevron USA, Inc.*, 884 F.2d 470, 473 (9th Cir. 1989); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1535 (11th Cir. 1990) (per curiam). Given the uniform resolution of the retaliation question by lower courts, there is no need for this Court to review this issue.

III. PETITIONER'S RECALL FROM LAYOFF WAS NOT LITIGATED BELOW.

McKnight requests review of the issue whether his recall from layoff constituted a "new and distinct" employment relationship that would be actionable under the "making" prong of § 1981 as an offer to contract on discriminatory terms. (Petition, at 6-7.) McKnight fails to disclose that this issue was not litigated below.

McKnight advanced two § 1981 claims in this case: (1) that he was discharged because of his race; and (2) that he was discharged in retaliation for filing discrimination complaints against his employer. (R. 1; R. 83.) While McKnight was permitted to introduce evidence regarding his layoff and recall in an effort to prove discriminatory intent, he did not pursue claims relating to the layoff and recall in this action.[3] Thus, the issue of what constitutes a new and distinct employment relation is not presented in this case, and any debate about this issue does not justify further review of the actionability of McKnight's discharge claims under § 1981. Moreover, as the Seventh Circuit noted, McKnight's arguments concerning his recall suggest a claim of constructive discharge which, even if meritorious, is not actionable under *Patterson's* construction of § 1981. 908 F.2d at 110.

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[3]McKnight's layoff claim was the subject of a parallel state court action which was finally resolved in GM's favor. *McKnight v. General Motors Corporation*, 157 Wis. 2d 250, 458 N.W.2d 841 (Ct. App. 1990).

CONCLUSION

For all of the foregoing reasons, GM respectfully requests that the Court deny the petition for certiorari.

Dated this 13th day of December, 1990.

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